Permah a/l Ramasamy v MBf Property Services Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-24-155 OF 1997
KAMALANATHAN RATNAM JC
31 JULY 1997

Land Law *— Possession — Delivery of vacant possession — Agreement provided that purchaser to only commence payment upon issuance of certificate of fitness — Issuance of temporary certificate for occupation by authorities — Whether purchaser must commence payment from issuance of temporary certificate — Building (Federal Territory of Kuala Lumpur) By-Laws 1985 by-laws 23, 24, 25 & 26*

The plaintiff entered into a sale and purchase agreement ('the agreement') for the purchase of a condominium in a project known as Bukit OUG-Surian Wangi Condominiums ('the project') whereby the first defendant was the project manager. It was a term of the contract of sale that the plaintiff would only be required to pay 10% of the purchase price and nothing else until the condominium purchased was completed and a certificate of fitness issued. By way of a letter dated 17 May 1993 from the first defendant to the plaintiff entitled 'Developer's Undertaking', it was stated that the interests accruing on any housing loan taken out by the plaintiff in relation to the purchase of the condominium would be borne by the first defendant on behalf of the plaintiff until the loan was fully drawn-down with the issuance of a certificate of fitness. On 25 August 1993, the plaintiff duly entered into a housing loan agreement with the second defendant. By way of a notice dated 22 January 1997, the second defendant demanded from the plaintiff the instalments due together with interests and attached therewith a temporary certificate for occupation dated 13 September 1996 and extended for six months. The plaintiff contended that as the certificate issued was only a temporary one, the first defendant ought to continue to pay the interests accruing until the final certificate of fitness was issued. Accordingly, the plaintiff filed this action seeking, inter alia, a declaratory order to that effect. The first defendant contended that the plaintiff could enter into occupation of the condominium either upon the issuance of a temporary certificate for occupation or a certificate of fitness for occupation issued by the respective authorities and in the circumstances, interest was payable by the plaintiff. Under cl 23 of the agreement, it was stated that in relation to vacant possession the plaintiff was not entitled to occupy the condominium until the certificate of fitness for the building was issued. In deciding the issue, the learned judge has to construe the relevant provisions of the Building (Federal Territory of Kuala Lumpur) By-Laws 1985 governing the issuance of certificates of occupation. Under by-law 26, a person would be entitled to enter into possession once a temporary certificate for occupation was issued.

Held, dismissing the application:

Whilst cl 23 of the agreement concerned possession, by-law 26 confirmed the right of occupation with the issuance of a temporary certificate of occupation. In the circumstances, it was wrong of the plaintiff to assume that he was only entitled to commence payment of the instalments and interest upon receipt of the certificate for occupation and not upon the receipt of the temporary certificate for occupation (see p 558E–F).

[Bahasa Malaysia summary

Plaintif telah mengikat suatu perjanjian jual beli ('perjanjian tersebut') untuk membeli sebuah kondominium dalam projek yang dikenali sebagai Kondominium Bukit OUG-Surian Wangi ('projek tersebut') di mana defendan pertama adalah pengurus projek tersebut. Ia merupakan suatu syarat kontrak jualan bahawa plaintif hanya dikehendaki membayar 10% daripada harga belian dan tiada apa lagi sehingga kondominium yang dibeli disiapkan dan perakuan kelayakan dikeluarkan. Melalui sepucuk surat bertarikh 17 Mei 1993 daripada defendan pertama kepada plaintif berjudul 'Akujanji Pemaju', ia dinyatakan bahawa faedah yang terakru atas mana-mana pinjaman perumahan yang diambil oleh plaintif berhubung dengan pembelian kondominium tersebut akan ditanggung oleh defendan pertama bagi pihak plaintif sehingga pinjaman 'fully drawn-down' dengan pengeluaran perakuan kelayakan. Pada 25 Ogos 1993, plaintif telah mengikat suatu perjanjian pinjaman perumahan dengan defendan kedua. Menerusi notis bertarikh 22 Januari 1997, defendan kedua telah menuntut daripada plaintif ansuran yang harus dibayar bersama dengan faedah dan melampirkan perakuan penghunian sementara bertarikh 13 September 1996 dan dilanjutkan selama enam bulan. Plaintif berhujah bahawa oleh kerana perakuan yang dikeluarkan hanyalah perakuan sementara, defendan pertama haruslah terus membayar faedah yang terakru sehingga perakuan kelayakan muktamad dikeluarkan. Oleh itu, plaintif memfailkan tindakan ini dengan meminta, antara lain, suatu perintah perisytiharan yang membayangkan demikian. Defendan pertama menghujahkan bahawa plaintif boleh mendapat milikan kondominium tersebut sama ada selepas pengeluaran perakuan penghunian sementara atau perakuan kelayakan untuk penghunian dikeluarkan oleh pihak berkuasa masing-masing dan dalam keadaan ini, faedah harus dibayar oleh plaintif. Di bawah fasal 23 perjanjian tersebut, ia dinyatakan bahawa berkaitan dengan milikan kosong plaintif tidak berhak menduduki kondominium tersebut sehingga perakuan kelayakan untuk bangunan tersebut dikeluarkan. Dalam memutuskan isu, hakim yang arif haruslah mentafsir peruntukan relevan Undang-Undang Kecil Bangunan (Wilayah Persekutuan Kuala Lumpur) 1985 yang menguasai pengeluaran perakuan penghunian. Di bawah undang-undang kecil 26, seseorang berhak mendapat milikan selepas perakuan penghunian sementara dikeluarkan.

Diputuskan, menolak permohonan:

Manakala fasal 23 perjanjian tersebut adalah berkenaan dengan milikan, undang-undang kecil 26 mengesahkan hak penghunian dengan pengeluaran perakuan penghunian sementara. Dalam keadaan begitu, adalah salah untuk plaintif menganggap bahawa ia hanya berhak memulakan bayaran ansuran dan faedah selepas menerima perakuan penghunian dan bukan selepas menerima perakuan penghunian sementara (lihat ms 558E–F).]

Notes

For a case on possession, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 2188.

Legislation referred to

Building (Federal Territory of Kuala Lumpur) By-Laws 1985 by-laws 23(1), 24, 25, 26

T Gunaseelan (*Rajadevan & Associates*) for the plaintiff.
Tay BB (*Heng & Mogan*) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam JC:

Facts

Sometime in 1993, the plaintiff saw an advertisement in the newspapers regarding the sale of condominiums at a project known as Bukit OUG-Surian Wangi condominiums ('the project') belonging to Sri Keladi Sdn Bhd of which the first defendant was the project manager. He was forthwith attracted to the said project because it was a term of the contract of sale that he was required to pay only 10% of the purchase price and not a cent more until the condominium that he purchased was completed and a certificate of fitness issued. He then purchased one unit condominium in the said project.

The first defendant by way of its letter dated 17 May 1993 and titled 'Developer's Undertaking' wrote as follows:

> We are pleased to inform you that in consideration of you purchasing the said unit we agree to pay all the interest accrued on your loan disbursed to pay for the purchase price of the above unit during the period of construction of the unit and until your loan is fully drawn down with the certificate of fitness being issued. The agreement to pay is not assignable by you and subject to you complying with the terms and conditions of your loan agreement with your end financier.

Based on the developer's undertaking dated 17 May 1993, the plaintiff entered into a sale and purchase agreement with Sri Keladi Sdn Bhd, the vendor. Then on 25 August 1993 the plaintiff entered into a housing loan agreement with the second defendant.

Plaintiff's case

It was the case of the plaintiff that the repayment of the loan would commence upon the issuance of the certificate of fitness. However, by way of a notice dated 22 January 1997, the second defendant demanded from the plaintiff the instalment due together with interest and together with that, the second defendant attached a temporary certificate for occupation dated 13 September 1996 and extended for six months (exh P-5). It was expressly stated in the said temporary certificate for occupation that during the period of time that the temporary certificate for occupation was valid it was necessary for the vendor to comply with the requirement as stated in Annexure A. However, Annexure A was not annexed by the second defendant to the copy of the temporary certificate for occupation it had sent to the plaintiff together with the notice of demand dated 22 January 1997. In the circumstances, the plaintiff contended that since the certificate issued was only a temporary certificate for occupation, the first defendant ought to continue to pay the interest until the final certificate for occupation was issued. The plaintiff therefore prayed for a declaration that he need not make any payment to the second defendant until a final certificate for occupation is issued.

Case for the defendants

In reply to the plaintiff's affidavit in support of his originating summons, one See Kiam Pee @ See Kian Pee, a manager of the first defendant, affirmed an affidavit in reply. He averred that it was the intention of the first defendant that the purchasers of the condominiums, including the plaintiff herein, were not to pay any interest on the loan advanced by the second defendant to the developer, until the purchasers including the plaintiff, entered into occupation of their respective condominiums. The first defendant contended that the plaintiff could enter into occupation of his condominium either with a temporary certificate for occupation or a certificate of fitness for occupation issued by the respective authorities. The first defendant then exhibited another similar temporary certificate for occupation marked as exh D-5 to the first defendant's affidavit. This temporary certificate was dated 9 April 1997 and is to expire on 8 October 1997. Again Annexure A was not exhibited. On behalf of the second defendant one Koo Boon Keong, the Jalan Ipoh branch manager of the second defendant affirmed an affidavit on almost identical terms to that of the first defendant's affidavit.

Court's findings

The relevant clause in the sale and purchase agreement which deals with the delivery of vacant possession is cl 23 and it reads as follows:

> Manner of delivery of vacant possession
>
> (1) Upon the issuance of a certificate by the vendor's architect certifying that the construction of the said parcel has been duly completed and water and electricity supply has been connected to the said parcel and

the vendor has applied for the issuance of the certificate of fitness for Occupation from the appropriate authority and the purchaser having paid all monies payable under cl 4(1) in accordance with the Third Schedule and all other monies due under this agreement and the purchaser having performed and observed all the terms and covenants on his part under this agreement the vendor shall let the purchaser into possession of the said parcel.

PROVIDED THAT such possession shall not give the purchaser the right to occupy and the purchaser shall not occupy the said parcel until such time as the certificate of fitness for occupation for the said building is issued.

(2) Upon the expiry of fourteen (14) days from the date of a notice from the vendor requesting the purchaser to take possession of the said parcel, whether or not the purchaser has actually entered into possession or occupation of the said parcel, the purchaser shall be deemed to have taken delivery of vacant possession.

It seems clear from this clause that for vacant possession to be given to the purchaser, the following conditions must have been performed, namely:

(a) the architect's certificate is to be issued certifying that construction has been completed and that water and electricity supply have been connected to the building in question;

(b) the vendor has applied for the issuance of a certificate for occupation from the appropriate authority;

(c) the purchaser to have paid all monies payable under cl 4(1) in accordance with the Third Schedule; and

(d) the purchaser to have performed and observed all the terms and covenants on his part.

The proviso, however, stipulates that such possession does not give the purchaser the right to occupy the said building until the Certificate of Occupation for the said building is issued.

One of the conditions necessary for occupation is that the vendor must merely apply for the issuance of the said certificate. There is no requirement for purposes of occupation that the said certificate must be issued.

It is my judgment that since cl 23(2) is a deeming clause in that upon expiry of 14 days from the date of a notice from the vendor requesting the purchaser to take possession of the said building, and whether or not the purchaser has actually entered into possession or occupation of the building, the purchaser is deemed to have taken delivery of vacant possession, the mere issuance of a certificate for occupation which normally is a temporary certificate for occupation is sufficient to give the second defendant the right to demand payment. The very fact that it is a requirement that water and electricity be connected is to my mind an indicator that occupation is intended; for if there is not to be occupation but merely taking possession, it would make no difference whether water and electricity had been connected or not. These are the basic amenities of a household in

occupation. Besides, once a temporary certificate for occupation has been issued for a fixed period, as in this case for six months, and upon the vendor through his architects having complied with the rectification of any defects as stipulated in the annexure to the temporary certificate for occupation, the relevant authorities would inevitably issue a certificate for occupation even if it is necessary to issue further prior temporary certificate for occupation, as in this case.

The law in question

The relevant legislation governing the issuance of the certificate of occupation is the Building (Federal Territory of Kuala Lumpur) By-Laws 1985. By-law 23(1) dealing with the certificate for occupation reads:

> (1) Certificate for Occupation of a building shall be given when —
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> (a) the qualified persons during the course of the work have certified in Form E as set out in the Second Schedule to these by-laws that they have supervised the erection of the building, that to the best of their knowledge and belief the building has been constructed in accordance with these by-laws and any conditions imposed by the Commissioner and that they accept full responsibility for those portions which they are respectively concerned with; and
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> (b) the Commissioner or an officer authorized by him in writing for the purpose has inspected the building.
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> (2) Nothing contained in this by-law shall prevent the Commissioner or any officer authorized by him in writing for the purpose from inspecting any building works at any stage thereof and calling attention to any deviation from the approved plan or non-compliance with any of these by-laws which he may observe and from giving notice in writing ordering such deviation to be rectified.

By-law 24 dealing with the temporary certificate for occupation reads:

> Subject to payment of the fees prescribed in the First Schedule to these By-laws, the Commissioner may in his discretion grant a Temporary Certificate for Occupation of a building for a period, not exceeding six months in cases where only minor deviations from the approved building plans have been made and pending full compliance with the requirements of the Commissioner before the issue of Certificate for Occupation.

By-law 25 dealing with partial certificate for occupation reads:

> (1) The Commissioner may in his discretion grant a Partial Certificate for Occupation of any part of a building partially completed and may impose any conditions that he deems necessary in the public interest:
>
> Provided that no such permit shall be granted if —
>
> (a) no application for Partial Certificate for Occupation has been made within the period of construction;
>
> (b) all essential services, including access roads, car parks, drains, sanitary, water and electricity installations, fire lifts where required, sewerage and refuse disposal requirements have not been provided; and

(c) the occupation of such parts of a partially completed building will prejudice public health or safety. A

(2) A Partial Certificate for Occupation once issued shall remain effective until the whole of the building is completed and a Certificate for Occupation is issued.

By-law 26 dealing with occupation without certificate for occupation reads: B

> No person shall occupy or permit to be occupied any building or any part thereof unless a Certificate for Occupation, a Partial Certificate for Occupation or a Temporary Certificate for Occupation has been issued under these by-laws for such building.

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It is evident from by-law 24 that a temporary certificate for occupation is only given for a period not exceeding six months, in cases when any minor deviations from the approved plans have been made and with the hope that within the six-month period such deviations would be put right upon which the certificate for occupation would be issued. There is no doubt that in such circumstances the certificate for occupation would follow as a matter of course. Even at this stage, if there is any doubt as to the right of the owner to occupy upon receipt of a temporary certificate for occupation, by-law 26 puts paid to any such doubt. This by-law clearly and unambiguously states that possession of a temporary certificate for occupation would permit a person to occupy the said building. D E

Whilst cl 23 of the agreement talks of possession, by-law 26 confirms the right of occupation with a temporary certificate for occupation. In the circumstances, it is a wrong assumption of the plaintiff that he is only entitled to commence payment of the instalments and interest upon receipt of the certificate for occupation and not upon receipt of the temporary certificate for occupation. The declaration sought must therefore perforce fall. I therefore had no hesitation in dismissing the application for declaratory relief with costs. F

Application dismissed.

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Reported by Lew Chee Seong

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